Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

No. 95-1232

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
v.
Petitioner,

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

BETTY D. MONTGOMERY
Ohio Attorney General
BARTON A. HUBBARD*
*(Counsel of Record)
ROBERT C. MAIER
Assistant Attorneys General
State Office Tower
30 East Broad Street 16th Floor
Columbus, Ohio 43215-3428
(614) 466-5967

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. May a taxpayer continue to assert a constitutional challenge before this Court where the State's supreme court decided as a matter of State law that the sole premise for the challenge did not exist, and may new premises now be asserted in violation of the State's jurisdictional rules where no evidentiary basis exists for considering and deciding such premises?

2. Assuming that the constitutional challenge may be heard: Does an exemption from sales and use tax that applies to natural gas sold by persons engaged in the regulated business of physically delivering gas through pipelines, but which does not apply to gas sold by unregulated marketers who do not physically deliver the gas, discriminate against interstate commerce or violate equal protection guarantees, where Petitioner has identified no way in which imposition of the tax depends upon the location of production, purchase or delivery of the gas?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

IMPORTANT STATUTORY PROVISIONS 1

STATEMENT 3

REASONS THE PETITION SHOULD BE DENIED . 6

1. Introduction 6

2. GENERAL MOTORS MAY NOT CONTINUE TO ASSERT ITS CONSTITUTIONAL CHALLENGE BEFORE THIS COURT BECAUSE THE OHIO SUPREME COURT DECIDED AS A MATTER OF STATE LAW THAT THE ASSERTED PREMISE FOR THE CHALLENGE DOES NOT EXIST, AND ANY CHALLENGE BASED UPON NEW FACTUAL OR LEGAL PREMISES SHOULD NOT BE HEARD BECAUSE THE RECORD CONTAINS NO EVIDENTIARY BASIS FOR CONSIDERING THESE NEW ARGUMENTS. 7

3. LIMITING THE SALES AND USE TAX EXEMPTION TO GAS PURCHASED FROM PUBLIC UTILITY GAS COMPANIES IMPOSES NO TARIFF, BECAUSE THE BURDEN OF TAXATION IN NO WAY DEPENDS UPON THE LOCATION OF PRODUCTION, PURCHASE OR DELIVERY OF NATURAL GAS. INSTEAD, THE EXEMPTION VALIDLY REFLECTS THE FUNDAMENTALLY DIFFERENT NATURE OF THE UTILITY BUSINESS 11

CONCLUSION 18

TABLE OF AUTHORITIES

Amerada Hess Corp. v. N.J. Taxation Div.,
490 U.S. 66 (1989) 13

American Trucking Associations, Inc. v. Scheiner,
483 U.S. 266 (1987) 14

Associated Industries v. Lohman,
114 S.Ct. 1815 (1994) 11, 14

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) . . 14

Brimmer v. Rebman, 138 U.S. 78 (1891) 14

C. & A. Carbone Inc. v. Town of Clarksburg,
114 S.Ct. 1677 (1994) 14

Cardinale v. Louisiana, 394 U.S. 437 (1969) 10

Chrysler Corp. v. Tracy,
652 N.E.2d 185 (Ohio 1995) 9

Citizens' Telephone Co. v. Fuller,
229 U.S. 322 (1913) 17

Cleveland Gear Co. v. Limbach,
520 N.E. 2d 94 (Ohio 1980) 8

Dean Milk Co. v. City of Madison,
340 U.S. 349 (1951) 14

Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources, 112 S.Ct. 2019 (1992) 14

General Motors Corp. v. Tracy (Jan. 21, 1994), B.T.A. Case No. 91-K-1558, unreported 9

General Motors Corp. v. Tracy, 652 N.E.2d 188 (Ohio 1995). 9

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963). 15

In the matter of the Application of Yankee Resources, Inc. (Sept. 9, 1982), PUCO No. 82-1086-GA-ARJ, unreported 5

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 14

Norandex, Inc. v. Limbach, 630 N.E.2d 329 (Ohio 1994) 8

Pacific Express Co. v. Seibert, 142 U.S. 339 (1892) 17

South-Western City Schools v. Kinney, 494 N.E.2d 1109 (Ohio 1986) 8

West Lynn Creamery v. Lynn, 129 L.Ed.2d 157 (1994) 14

Wilson v. Cook, 327 U.S. 474 (1945) 10

STATUTES AND RULES

Ohio Revised Code Section 4905.03(A)(6) 2

Ohio Revised Code Section 5717.02 8

Ohio Rev. Code Section 5727.01(D)(4) 2

Ohio Rev. Code Section 5739.02(B)(7) 1, 16

U.S. Supreme Court Rules 10.1(b) and (c) 6

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1990) 12

No. 95-1232

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
v.
Petitioner,

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

IMPORTANT STATUTORY PROVISIONS

The Ohio statutes show that the exemption at issue is part of a separate system of taxing and regulating natural gas companies and other public utilities. As applied to natural gas companies the relevant provisions are:

1. Section 5739.02(B)(7) of the Ohio Revised Code provides the following sales tax exemption:

> (B) The tax does not apply to the following:
>
> (7) Sales of natural gas by a natural gas

> company, of water by a waterworks company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code;

2. Section 5727.01(D)(4), previously (E)(4), of the Ohio Revised Code provides the following definition of "natural gas company" for purposes of the public utility gross receipts and personal property taxes:

> (D) Any person:
>
> (4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state;

3. Section 4905.03(A)(6) of the Ohio Revised Code provides the following definition "natural gas company" for purposes of public utility regulation:

> (A) Any person ... is:
>
> (6) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state ...

STATEMENT

General Motors Corporation ("General Motors") initiated this case by contesting the assessment of use tax with respect to certain purchases of natural gas. It sought the benefit of a limited exemption from sales and use taxation, which applies to sales of natural gas by a regulated natural gas utility company. However, the Ohio Tax Commissioner, the Ohio Board of Tax Appeals and the Ohio Supreme Court all agreed that the exemption did not apply with respect to gas purchased from unregulated natural gas marketers.

In the proceedings below, General Motors raised a single constitutional challenge to the assessment, but was completely unable to substantiate the underlying premise of that challenge. General Motors contended that Ohio had discriminatorily imposed the tax based upon whether the gas was purchased within Ohio or outside of Ohio. As this allegation of discriminatory taxation was refuted by testimony presented to the Board of Tax Appeals, the Board concluded that the Ohio Tax Commissioner did not determine tax liability based upon the location of the purchase. In affirming that "natural gas company" for purposes of exemption from sales and use taxation had the identical meaning as the same term for purposes of utility regulation, the Ohio Supreme Court thereby clarified that the place at which title to natural gas passed did not form the basis for denying the exemption.

Specifically, General Motors asserted before the Board of Tax Appeals that its purchases of natural gas from marketers, delivered by natural gas utility companies to General Motors in Ohio, were "out-of-state" purchases because title to the gas passed from the marketers to General Motors outside of Ohio. Under General Motor's theory, if title to the gas had passed to General Motors within Ohio,

the Ohio Tax Commissioner would allegedly have exempted General Motors' purchases from sales and use taxation. However, unrebutted testimony by key personnel of the Ohio Tax Commissioner presented at the evidentiary hearing before the Board of Tax Appeals refuted General Motors' allegation of discriminatory taxation: what mattered for tax purposes was not the place where title to natural gas was transferred, but whether the gas was purchased from natural gas marketers (a taxable transaction) or regulated natural gas utilities (exempt). I Tr. 29-30, 42-51, 90-95; II Tr. 186-189. The latter type of seller is a "natural gas company" subject to taxation and regulation as a public utility.

Now, General Motors suggests that the distinction between an unregulated marketer and a regulated natural gas utility somehow discriminates against interstate commerce. In this respect, the petition exalts linguistic implication over substantive argument. Nowhere does General Motors specify any factual basis for asserting a discrimination against interstate commerce in this instance.

Instead, General Motors attempts to mislead by mislabeling activities as "in-state" or "out-of-state" where the record in fact shows no such distinction. For example, the petition repeatedly refers to the marketers as "out-of-state" entities and regulated natural gas utility companies as "in-state" entities, but the record does not support this labeling. In fact, General Motors' own exhibit [Ex. 22, Supp. 632] reveals that one of the principal marketers from whom General Motors purchased, Yankee Resources, Inc. (later Access Energy Corp.) now known as Enron Access Corp., has its principal office in Dublin, Ohio.[1] Likewise, the

---

[1] Enron Access filed an amicus brief *in support of the Tax Commissioner*--not General Motors--in the Ohio Supreme Court, and is now filing as an amicus in opposition to General Motors' certiorari

record is devoid of any evidence that the Ohio Tax Commissioner restrictively applied the definition of "natural gas company" only to those entities whose corporate headquarters, offices or activities were exclusively within Ohio.

By mischaracterizing the assessment as a "tariff," General Motors suggests that the tax is somehow imposed only with respect to natural gas that originates outside Ohio. Not only is there no support for such an implication in the record but the testimony establishing the criterion for denying the exemption refutes it. I Tr. 29-30, 42-51, 90-95; II Tr. 186-189. While the cases General Motors cites prohibit tariffs, Ohio's tax structure simply does not impose such a discriminatory tax.

Ultimately, the natural gas utility exemption has a reasonable basis, because by its nature the business of physically delivering natural gas to consumers is different from the business of brokering natural gas sales. Indeed, a natural gas company is a public utility, heavily regulated in every aspect of its business, and therefore has a totally different relationship to the public from that of an unregulated gas marketing business. The exemption clearly lies well within Ohio's legitimate exercise of its sovereign taxing power. Accordingly, this case presents no question of substance for this Court to consider.

---

petition. The nature of Enron Access' marketing business is well-described in an order of the Public Utilities Commission of Ohio, holding that Enron Access' business of brokering natural gas contracts does not subject it to Ohio public utility regulation. *In the matter of the Application of Yankee Resources, Inc. (Sept. 9, 1982), PUCO No. 82-1086-GA-ARJ,* unreported (App. at *2a-5a).*

REASONS THE PETITION SHOULD BE DENIED

1. Introduction

The petition for certiorari should be denied because the grounds for exercising jurisdiction are not present. As stated in Supreme Court Rules 10.1(b) and (c), certiorari is proper "[w]hen a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," or "[w]hen a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." General Motors has not even alleged, let alone shown, any conflict between state courts or between state and federal appeals courts, and the only commerce clause decisions of this Court that General Motors cites address discrimination against interstate commerce, which is not present here.

Moreover, General Motors fails to establish that this case presents any "important federal question" whatsoever. Completely absent from the petition is any allegation of how interstate commerce is impeded by separately taxing and regulating public utilities. To the contrary, the amicus Enron Access--the only marketer and alleged interstate commerce "victim" before this Court--asserts that the separate tax and regulatory treatment facilitates its own business of brokering interstate natural gas contracts, and therefore Enron strongly opposes General Motors' petition.

Finally, General Motors' assertion that its petition raises "a recurring issue" (Pet'n. at 14) is belied by its failure to cite any other case in which a taxpayer has challenged a state's classification of natural gas utilities

differently from natural gas marketers. If this were "a recurring issue" it would become important enough for consideration by state and federal courts, and any resulting conflict among their decisions could later be resolved by this Court once the issue had fully ripened for this Court's consideration.

2. GENERAL MOTORS MAY NOT CONTINUE TO ASSERT ITS CONSTITUTIONAL CHALLENGE BEFORE THIS COURT BECAUSE THE OHIO SUPREME COURT DECIDED AS A MATTER OF STATE LAW THAT THE ASSERTED PREMISE FOR THE CHALLENGE DOES NOT EXIST, AND ANY CHALLENGE BASED UPON NEW FACTUAL OR LEGAL PREMISES SHOULD NOT BE HEARD BECAUSE THE RECORD CONTAINS NO EVIDENTIARY BASIS FOR CONSIDERING THESE NEW ARGUMENTS.

Below, General Motors based its constitutional challenge on where title to the gas was transferred. Here, General Motors bases its constitutional challenge on the nature of the entities. General Motors cannot change horses in mid-stream.

Before the Ohio Board of Tax Appeals, General Motors specified the following claim:

> The [Ohio Tax] Commissioner's application here of the Ohio sales and use tax laws... is proscribed by the Commerce Clause [or the Equal Protection Clause] of the United States Constitution because it results in an assessment of Ohio use tax on natural gas *purchased outside the State of Ohio* and delivered through pipes to consumers in Ohio

> when natural gas *purchased within Ohio* and delivered through pipes to consumers in Ohio would not be subjected to an Ohio sales or use tax. (Emphasis added.) App. at 8a-9a.

No additional constitutional issues were asserted to the Board, and Ohio law requires precise specification of each such issue in order to create jurisdiction. Ohio Revised Code Section 5717.02; *Cleveland Gear Co. v. Limbach*, 520 N.E. 2d 94, syl. para. 3 (Ohio 1980), *Norandex, Inc. v. Limbach*, 630 N.E.2d 329, 333 n.1 (Ohio 1994) (taxpayer's properly asserted commerce clause challenge under the "substantial nexus" prong of the *Complete Auto* test did not confer jurisdiction to consider later challenge based upon the "fair apportionment" prong of the *Complete Auto* test).

Nor is this rule merely procedural. As the Ohio Supreme Court previously explained, specification of error is necessary in order to give both sides the opportunity to fully develop the case:

> Had the equal protection issue in this case, for instance, been raised during the proceedings before the attorney examiner, it is entirely possible that the City of Columbus would have developed an evidentiary record sufficient to show that the statute was applied constitutionally. By waiting until now to raise the issue, the school board has deprived the city of an opportunity to develop the record on the point. This itself raises due process considerations. *South-Western City Schools v. Kinney*, 494 N.E.2d 1109, 1111 (Ohio 1986).

In this case, General Motors asserted a single premise for its constitutional claim: a purported discrimination

between in-state and out-of-state purchases. The Board of Tax Appeals rejected the asserted premise, finding that "the Tax Commissioner's assessment of use tax in the present case is not based upon where title to the natural gas passes..." because the tax was assessed upon "purchases of natural gas from entities which are without the physical capabilities to transport and distribute natural gas to its customers." *General Motors Corp. v. Tracy* (Jan. 21, 1994), B.T.A. Case No. 91-K-1558, unreported at 13; Appendix to General Motors' Petition at 15a.

The Ohio Supreme Court did the same. The Court held that the Tax Commissioner's application of the statute did not "favor in-state vendors over out-of-state vendors" because he "treat[ed] purchases from both the same." *General Motors Corp. v. Tracy*, 652 N.E.2d 188 (Ohio 1995). In doing so, the Supreme Court relied upon *Chrysler Corp. v. Tracy*, 652 N.E.2d 185 (Ohio 1995)[2], that gas purchased from a natural gas marketer did not fall within the exemption of purchases from a "natural gas company," because the marketer was not, as required by the statute, "engaged in the business of supplying natural gas..." *General Motors*, 652 N.E. 2d at 189.

Despite the different argument raised below, General Motors now argues that the very tax distinction between gas sold by a public utility and gas brokered by independent marketers is somehow unconstitutional. As noted above, this contention was never presented to the Ohio Board of Tax Appeals--a jurisdictional requirement of Ohio law. As a result, the Tax Commissioner of Ohio had no reason or

---

[2] Chrysler, it is worth adding, raised no constitutional challenges to the Commissioner's assessment of sales and use taxes on its purchases of natural gas from the marketer Access Energy Corp., one of the very marketers from whom General Motors purchased in the present case.

opportunity to develop evidence rebutting the unfounded assertion. The lack of factual record raises powerful jurisdictional and prudential reasons for this Court to decline to hear this newly minted argument. See *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (dismissing certiorari writ where constitutional challenge to state statute was not properly raised and evidentiary record not developed in the state court) ("Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality."). See also *Wilson v. Cook*, 327 U.S. 474, 483 (1945) (even though the question presented was "in some manner related to that decided by the state court," the question would not be considered because it was "so distinct from the question decided by the state court that our decision in the issue raised there would not necessarily decide that now sought to be raised.").

This reasoning applies with particular force here. In response to General Motors' allegation that the imposition of tax depended upon the place title to natural gas was transferred, the Ohio Tax Commissioner introduced evidence--the uncontroverted testimony of top operating personnel within the Department of Taxation--showing that no such distinction had been made. Under these circumstances, the Commissioner had no reason to introduce evidence regarding the relative overall tax burdens on gas sold by marketers as opposed to gas sold by the natural gas utility companies, for the simple reason that General Motors did not place the distinction at issue before the Ohio Board of Tax Appeals.

On this record the writ should be denied.[3]

3. LIMITING THE SALES AND USE TAX EXEMPTION TO GAS PURCHASED FROM PUBLIC UTILITY GAS COMPANIES IMPOSES NO TARIFF, BECAUSE THE BURDEN OF TAXATION IN NO WAY DEPENDS UPON THE LOCATION OF PRODUCTION, PURCHASE OR DELIVERY OF NATURAL GAS. INSTEAD, THE EXEMPTION VALIDLY REFLECTS THE FUNDAMENTALLY DIFFERENT NATURE OF THE UTILITY BUSINESS.

The players in the business of selling natural gas are natural gas marketers and natural gas utilities. In its petition, General Motors does not assert any discrimination in the Ohio sales and use tax law between sales by "in-state" marketers and sales by "out-of-state" marketers. Nor does General Motors assert any discrimination between sales by "in-state" utilities and sales by "out-of-state" utilities. Instead, General Motors alleges discrimination between sales

---

[3] Indeed, the record as it now stands shows that (i)marketers are engaged in brokering bulk gas sales largely to industrial consumers; (ii) gas purchased for direct use in manufacturing enjoys complete exemption from sales and use taxation--a substantial benefit to General Motors here; and (iii) gas sales by utilities are subject to the gross receipts tax imposed on utilities generally (but not on unregulated natural gas marketers), under which there is no manufacturing exemption. It is highly probable that further evidence would show an overall favorable treatment of marketer gas sales by comparison with utility gas sales, thereby removing the very premise General Motors now--in the absence of a developed record--appears to assert. See *Associated Industries v. Lohman*, 114 S.Ct. 1815, 1824-25 (1994) (declining to find uniform use tax on purchases from out-of-state vendors unconstitutional as applied with respect to taxing districts imposing a greater sales tax burden than the uniform use tax rate): "[W]e have emphasized that 'equality for purposes of ... the flow of commerce is measured in dollars and cents, not legal abstractions.'"

by utilities and sales by marketers. This is based on an "apples to oranges" comparison, and simply does not constitute an unlawful "discrimination" under this Court's commerce clause analysis.

At page 11 of its petition, General Motors asserts that "the Ohio scheme appears to be little more than a tariff on all gas not sold by a local public utility." Indeed, the cases cited by General Motors all relate to claims of direct discrimination against interstate commerce by taxes that amount to partial tariffs. General Motors slyly suggests a discrimination against interstate commerce by speaking of gas sold by a "local" public utility, but this is a red herring because the physical delivery of natural gas to General Motors facilities--including the delivery of gas purchased through marketers--occurs through pipelines controlled by those same public utilities. There is no "non-local" or "interstate" public utility here to be discriminated against. Instead, there is only the distinction between purchases from unregulated marketers and purchases from the regulated natural gas utility itself, which is a unique business.

Black's Law Dictionary (6th ed. 1990) at 1456-57 defines tariff as "a series of schedules or rates of taxes on imported goods." The key word is "import": a tariff, unlike other taxes, falls upon particular goods based upon the location in which they are produced and placed into commerce. Without specifically saying how, General Motors suggests that the limited exemption for natural gas companies at issue here somehow rests upon the location of production, purchase or delivery of natural gas rather than constituting--as it in fact does--a legitimate distinction based upon the completely different nature of the regulated natural gas utility business.

The crucial distinction was drawn by this Court in

Amerada Hess Corp. v. N.J. Taxation Div., 490 U.S. 66 (1989). In that case, integrated oil companies were subject to a federal windfall profits tax because they produced oil, while oil distributing companies did not pay windfall tax because they did not engage in production activities at all. New Jersey required corporations paying business tax to "add back" into taxable income any amount deducted in calculating the federal taxable income figure if that amount pertained to a tax on profits or income. The integrated oil companies argued that the requirement to "add back" windfall tax, which they had properly deducted on their federal returns, effected a discrimination against them in favor of oil distributors. The alleged discrimination was purported to violate commerce clause and equal protection principles, but this Court disagreed:

> [W]hatever disadvantage this deduction denial might impose on integrated oil companies does not constitute discrimination against interstate commerce. Appellants [integrated oil companies] operate both in New Jersey and outside New Jersey. Similarly, non-producing retailers may operate both in New Jersey and outside the State. *Whatever different effect the add-back provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities.* (Emphasis added.)
>
> 490 U.S. at 78.

Thus, a tax distinction based upon the nature of a business rather than the location of business activity passes constitutional muster.

What is more, in each of the cases cited by General Motors, the imposition of tax depended upon the place of origination or other related business activity.[4] That simply

---

[4] Each of the cases relies on clear distinctions between in-state or out-of-state business activities not present here: (i) An assessment and rebate scheme that effectively pushed the burden of taxation upon out-of-state milk producers while reimbursing and relieving in-state producers violated the commerce clause in *West Lynn Creamery v. Lynn*, 129 L.Ed.2d 157 (1994); (ii) The exemption from a general sales tax for locally produced liquor discriminated against commerce in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); (iii) The imposition of a use tax rate on out-of-state purchases that was higher than the sales tax rate for a particular in-state taxing district violated the commerce clause in *Associated Industries v. Lohman*, 114 S.Ct. 1815 (1994); (iv) A Pennsylvania flat tax per axle which placed a disproportionate burden on truckers whose vehicles were not registered in Pennsylvania was unlawfully discriminatory in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987); (v) A state statute purporting to permit counties to exclude from landfills waste generated outside the county violated the commerce clause in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 112 S.Ct. 2019 (1992); (vi) A local ordinance mandating that all waste processing be accomplished at a specified local facility violated the commerce clause by forcing all such activity to be conducted at the specified location and thereby discriminating against all other persons--including out-of-state businesses--engaged in providing waste processing services, *C. & A. Carbone Inc. v. Town of Clarksburg*, 114 S.Ct. 1677 (1994); (vii) A local ordinance forbidding the sale of milk within the city unless pasteurized within a five mile radius unconstitutionally discriminated against milk pasteurized elsewhere and imported, including out-of-state milk, in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); (viii) Special inspection requirements for meat slaughtered more than 100 miles from the place of sale discriminated against interstate commerce in *Brimmer v. Rebman*, 138 U.S. 78 (1891); (ix) A tax credit favoring ethanol produced in-state constituted clear discrimination against ethanol produced in other states in violation of the commerce clause, and was not saved by a reciprocity provision, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); (x) Including labor and shop costs in use tax calculation where the user of equipment manufactured the equipment out of state violated the commerce clause where such costs would not be taxed against a user who

is not the case here. By contrast, Ohio has created a limited exemption from sales and use taxation as part of a comprehensive system of regulating and taxing public utilities. The exemption pertains to the highly regulated and monopolistic nature of utility businesses, not to some scheme to burden interstate commerce. Therefore, the tax is not a tariff at all, and General Motors' bare assertion of discrimination does not create a constitutional claim.

Just as significantly, General Motors makes no attempt to specify any factual basis for its nebulous claim that the Ohio Tax Commissioner discriminated against "out-of-state purchases." No such evidence exists. The record refutes any inference that the imposition of tax depends upon the place where the natural gas originates.

General Motors attempts to analogize to newspaper publishing and furniture retailing (Pet'n., at 14). These scenarios are no analogy at all because they contain two key factual premises which are not present in this case. First, there is nothing analogous to "in-state" as opposed to "out-of-state" newspaper or furniture production here, because the assessment of use tax with respect to natural gas purchases is not based upon where the gas is produced. Second, the record incontestably establishes that the natural gas purchased through dealings with marketers and the gas purchased from the natural gas utility company itself are physically delivered to the consumer through pipelines controlled by the utility. Thus, no distinction arises between the means by which natural gas sold by marketers is delivered and the means by which natural gas sold by utilities is delivered. Therefore, these scenarios distort rather than clarify this case.

---

manufactured the equipment in-state, *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

General Motors also continues to ignore the central fact in this case: the exemption from sales and use taxation constitutes one aspect of a comprehensive scheme of taxing and regulating public utilities. Far from constituting a "tariff," the existence of an exemption for gas sold by "natural gas companies," *i.e.*, companies engaged in the business of physically distributing gas to consumers through pipelines, reflects the particular, highly regulated nature of the public utility business.

First, the sales and use tax exemption in Ohio Revised Code Section 5739.02(B)(7) applies to various types of entities that are taxed and regulated as public utilities by Ohio, including electric companies, water companies and heating companies, as well as natural gas companies. As regulated public utilities, all are required to supply to the general public on terms prescribed by the public utility regulatory law. Second, natural gas companies--like other regulated utilities--are subject to a number of taxes unique to public utilities, including the public utility property tax and the public utility gross receipts tax imposed pursuant to Ohio Revised Code Chapter 5727. Finally, public utilities are subject to a panoply of regulations, including those limiting the freedom of such companies to deal with specific customers or charge certain rates.

By stark contrast, the independent unregulated marketers are free, on a contract-by-contract basis, to broker deals with consumers such as General Motors to meet unique industrial needs. The marketers do not operate pipelines at all and do not engage in physical distribution of gas to consumers. The completely different nature of their business and the complete freedom from regulation was clearly established in the testimony of Steven Jaffe, executive vice president of one of General Motors' principal marketers, Enron Access Corp., then known as Access Energy Corp.

II. TR. 150-157.

Because their businesses are entirely different in nature, the granting of an exemption with respect to gas sold by the utility itself does not raise commerce clause or equal protection concerns in this instance. Indeed, this Court has rejected equal protection challenges by acknowledging the inherent rationality of distinguishing for tax purposes between companies that own infrastructure within a state to engage in physical distribution, and companies that own no such facilities but instead contract with others to make their deliveries. See *Pacific Express Co. v. Seibert*, 142 U.S. 339, 353 (1892) (express companies, which contracted with railroads and steamboat companies for the transportation services they sold could rationally be subjected to a gross receipts tax from which the railroads and steamboat companies themselves were exempt); *Citizens' Telephone Co. v. Fuller*, 229 U.S. 322, 352 (1913): "... [The statute] has a reasonable basis, resting on a real distinction. ... There is a difference in the doing of business and its results: a difference in relation to the public."

Likewise, public utility gas companies and independent marketers of gas engage in different businesses and occupy different positions in the chain of transactions that brings natural gas from the well to a consumer such as petitioner. Accordingly, neither the commerce clause nor the equal protection clause requires the utility business to be treated the same for tax purposes as the totally different business of brokering natural gas contracts.

Finally, acceptance of General Motors underlying premise in this case--that a state cannot validly classify public utilities engaged in physical transmission of natural gas differently from private marketers that merely broker natural gas contracts--would inundate this Court with a tidal wave of

commerce clause challenges. Suddenly, long-standing state statutory schemes classifying public utilities differently from private, unregulated entities would be rendered constitutionally suspect. General Motors' petition identifies no reason to call into question well-established law.

CONCLUSION

For all the foregoing reasons, the Tax Commissioner of Ohio respectfully requests this Court to deny the petition for certiorari.

Respectfully submitted,
BETTY D. MONTGOMERY
Ohio Attorney General

BARTON A. HUBBARD*
Assistant Attorney General
*Counsel of Record
ROBERT C. MAIER
Assistant Attorney General
State Office Tower
30 East Broad Street 16th Floor
Columbus, Ohio 43215-3428

COUNSEL FOR RESPONDENT

APPENDIX

Order of The Public Utilities Commission of Ohio, *In the Matter of the Application of Yankee Resources, Inc.* (Sept. 9, 1982), PUCO No. 82-1086-GA-ARJ 2a

Notice of Appeal of Appellant, General Motors Corporation, to the Ohio Board of Tax Appeals in *General Motors Corporation v. Roger W. Tracy, Tax* Commissioner of Ohio, B.T.A. Case No. 91-K-1558, filed November 19, 1991 . . . . . 6a

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Yankee Resources, Inc., for Relief from Compliance with the Obligations Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Ohio Revised Code.	)))))))	Case No. 82-1086-GA-ARJ

ENTRY

The Commission, coming now to consider the above-entitled matter, makes the following findings:

1) On August 24, 1982, Yankee Resources, Inc., 6500 Busch Boulevard, Columbus, Ohio 43229, filed an application with the Commission requesting relief from compliance with the obligations imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Revised Code.

2) Yankee Resources is or anticipates being a party to certain contracts pertaining to the purchase of natural gas from independent Ohio gas producers and from public utilities and the sale of such natural gas from these sources to various entities, including industrial end users, other public utilities, and interstate pipeline companies. Yankee Resources' contracts are or will be those involving Ohio producers' sale of all natural gas produced from specified wells to Yankee Resources, those involving spot purchases from public utilities, and those

involving buyers of natural gas who agree to pay Yankee Resources for the natural gas production described in the purchase contracts. Approximately 90% of the volumes of natural gas transferred by these contracts is purchased by an interstate pipeline company.

3) Yankee Resources receives compensation for its role in locating sellers and buyers and assisting them in their transportation arrangements pursuant to purchase and sale contracts. Management of these contracts is involved in the services which Yankee Resources performs. In short, the services performed are that of a marketer or broker of contracts for natural gas which services typically include taking legal title to the natural gas.

4) Yankee Resources is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas to consumers. Yankee Resources does not engage in the business of transporting natural gas through pipes or tubing either wholly or partly within this state as it has no physical plant through which natural gas is transported.

5) Sections 4905.03(A)(6), Revised Code, sets forth the definition of a natural gas company as follows:

> A natural gas company, when engaged in the business of supplying natural gas for

> lighting, power, or heating purposes to consumers within this state, or when engaged in the business of supplying natural gas to gas companies or natural gas companies within this state.

6) Section 4905.03(A)(7), Revised Code, defines a pipe-line company as follows:

> A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state.

7) The Commission is of the opinion that Yankee Resources' activities are not the type which fall under either the definition of a natural gas company or a pipe-line company. Yankee Resources' operations consist of coordinating buyers with sellers of natural gas through certain contractual arrangements and assisting them in making arrangements of transportation of the gas. The applicant owns no physical facilities with which to transport gas. The Commission believes that the marketing or brokering of natural gas contracts is not an activity contemplated by Section 4905.03, Revised Code. Accordingly, the Commission finds that Yankee Resources is not a public utility and is not subject to the obligations imposed by Chapters 4901, 4903, 4905, 4907, 4909,4921, and 4923, Revised Code.

It is, therefore,

ORDERED, That the application of Yankee Resources, Inc. for Relief from Compliance with the Obligations Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Revised Code is granted. It is, further,

ORDERED, That a copy of this Entry be served upon Yankee Resources, Inc.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ John Kelly
(Chairman)

/s/ Dennis Pines

/s/ Michael Del Bane
(Commissioners)

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

GENERAL MOTORS CORPORATION General Motors Building 3044 West Grand Boulevard - TX-40 Detroit, MI 48202 Appellant, v.	)	
	)	Case No. 91-K-1558
ROGER W. TRACY, TAX COMMISSIONER OF OHIO State Office Tower 30 East Broad Street - 22nd Fl. Columbus, OH 43266-003- Appellee.	)	(Ohio Use Tax) NOTICE OF APPEAL

General Motors Corporation ("GM") hereby gives notice of appeal to the Ohio Board of Tax Appeals pursuant to R.C. 5717.02 from a final determination of the Tax Commissioner of Ohio ("Commissioner") issued on October 29, 1991. A true copy of the Commissioner's final determination is attached to this notice as Exhibit A and is incorporated herein by reference.

Background

On April 4, 1991, the Commissioner issued to General Motors Corporation, B-O-C Group, an Ohio use tax assessment, serial no. 91004768 U, in the amount of $106,377.11 (including preassessment interest and penalties). The assessment relates to GM's storage, use or other consumption of natural gas in Ohio during the period January 1, 1987 to December 31, 1989, that was purchased from Mobil Natural Gas, Inc. ("MNG"). GM's purchases of natural gas from MNG arise from sales consummated outside the State of Ohio. The natural gas purchased from MNG was delivered to GM into an interstate pipeline at a point outside of Ohio and it was transported to Ohio through an interstate pipeline network and, thereafter, delivered to GM in Ohio through "pipes."

GM timely filed a petition for reassessment objecting to the entire assessment and, alternatively, requesting a remission of the statutory penalties. Following a hearing on the petition, the Commissioner issued his final determination wherein he affirmed the assessment of tax and preassessment interest but conditionally cancelled the penalties in excess of five percent (5%).

Specifications of Error

GM complains of the following errors by the Commissioner in the final determination appealed here:

> 1. The Commissioner erred in failing to find that GM's storage, use or other consumption of natural gas that was subjected to assessment here was exempt from the Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), because

it was acquired from a "natural gas company" within the meaning of R.C. 5727.01(E)(4) and delivered to GM in Ohio through "pipes."

2. The Commissioner erred in failing to find that MNG must be considered a "natural gas company" within the meaning of R.C. 5727.01(E)(4) for purposes of determining whether GM's storage, use or other consumption of natural gas that was subjected to assessment here was exempt from the Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).

3. The Commissioner erred in finding that no "relevant evidence" was presented to establish that MNG is a "natural gas company" within the meaning of R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).

4. The Commissioner's application here of the Ohio sales and use tax laws, particularly R.C. 5727.01, R.C. 5739.02 and R.C. 5741.02, is proscribed by the Commerce Clause of the United States Constitution because it results in an assessment of Ohio use tax on natural gas purchased outside the State of Ohio and delivered through pipes to consumers in Ohio when natural gas purchased within Ohio and delivered through pipes to consumers in Ohio would not be subjected to an Ohio sales or use tax.

5. The Commissioner's application here of

the Ohio sales and use tax laws, particularly R.C. 5727.01, R.C. 5739.02 and R.C. 5741.02, is proscribed by the Equal Protection Clause of the United States Constitution because it results in an assessment of Ohio use tax on natural gas purchased outside the State of Ohio and delivered through pipes to consumers in Ohio when natural gas purchased within Ohio and delivered through pipes to consumers in Ohio would not be subjected to an Ohio sales or use tax.

6. Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, Ohio use tax was assessed erroneously on the storage, use or other consumption of natural gas in Ohio that was acquired for use by GM directly in producing tangible personal property for sale by manufacturing or processing. Accordingly, the storage use or other consumption of such natural gas was exempt from the Ohio use tax by R.C. 5739.01(E)(2), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).

7. Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by either R.C. 5739.01(E)(2) or R.C. 5739.02(B)(7), as made applicable to the Ohio

use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, R.C. 5739.133(A)(3) does not authorize the Commissioner to assess a penalty on preassessment interest charged pursuant to R.C. 5739.133(B).

7 [sic]. Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by either R.C. 5739.01(E)(2) or R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, the Commissioner abused his discretion in failing to remit entirely any penalties assessed pursuant to R.C. 5739.133(A).

Relief Requested

GM requests that this Board issue an order vacating the entire assessment of Ohio use tax appealed here. GM further requests that this Board schedule a hearing on the assessment so that GM might present testimony and evidence in support of the errors alleged herein and as required by R.C. 5717.02 and the decision of the Supreme Court of Ohio in *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, *syl.* 3, and that reasonable notice of the hearing be given to GM's attorney.

Respectfully submitted,

/s/ JOHN C. DUFFY, JR.
Jones, Day, Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-7145

Attorney for Appellant
General Motors Corporation